IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 10, 2002

# STATE OF TENNESSEE v. KENNY MELTON

**Appeal from the Criminal Court for Blount County**
**No. C-12290 D. Kelly Thomas, Jr., Judge**

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**No. E2002-00581-CCA-R3-CD**
**April 2, 2003**

The defendant, Kenny Melton, was convicted of the sale of more than .5 grams of cocaine within 1000 feet of a school, a Class A felony. See Tenn. Code Ann. §§ 39-17-417, -432. The trial court imposed a sentence of twenty years. In this appeal of right, the defendant asserts that the evidence is insufficient and the sentence is excessive. The judgment of the trial court is affirmed.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed**

GARY R. WADE, P.J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

Mack Garner, District Public Defender, for the appellant, Kenny Melton.

Paul G. Summers, Attorney General & Reporter; Angele M. Gregory, Assistant Attorney General; and John Bobo, Assistant District Attorney General, for the appellee, the State of Tennessee.

## OPINION

In May of 1998, while Trooper Derrick Swenson of the Tennessee Highway Patrol was working undercover for the Fifth Judicial District Drug Task Force, he received information from a confidential informant named Tina Downey that the defendant wanted to sell one gram of cocaine. Ms. Downey arranged a meeting on May 8th at a residence in Maryville, which was located just across the street from Sam Houston Elementary School. According to Trooper Swenson, the defendant walked from the residence, met him and Ms. Downey in the street, and provided one gram of cocaine in exchange for $110. Trooper Swenson also discussed with the defendant the purchase of an "eightball," which is one-eighth of an ounce of cocaine. As the transaction was made, school busses were present and children were playing in front of the school.

At trial, Trooper Swenson testified that he made an audio recording of the transaction, which was introduced as evidence. The defendant can be heard saying that the neighborhood was "cool"

and a good location for selling drugs. The distance between the sign in front of the school and the cocaine transaction was 74 feet.

Celeste White, a chemist with the Tennessee Bureau of Investigation, weighed and tested the substance sold to Trooper Swenson. According to Ms. White, the substance, which was originally packaged in two separate baggies, was cocaine having a total weight of .61 grams.

**I**

In this appeal, the defendant asserts that the evidence was insufficient to support his conviction because the state failed to prove beyond a reasonable doubt that each of the two baggies that Trooper Swenson purchased from him contained cocaine. He argues that an infrared spectrometer test performed by Ms. White did not conclusively establish that each baggy contained cocaine because she had mixed a sample from each for testing purposes.

When considering a sufficiency question on appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

Tennessee Code Annotated section 39-17-417 provides, in pertinent part, as follows:

> (a) It is an offense for a defendant to knowingly:
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> * * *
>
> (3) Sell a controlled substance;
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> * * *
>
> (c) A violation of subsection (a) with respect to:
>
> (1) Cocaine is a Class B felony if the amount involved is point five (.5) grams or more of any substance containing cocaine and, in addition thereto, may be fined not more than one hundred thousand dollars ($ 100,000)[.]

Tenn. Code Ann. § 39-17-417(a)(3), (c)(1) (1997). Tennessee Code Annotated section 39-17-432 provides that

> A violation of § 39-17-417, or a conspiracy to violate such section, that occurs on the grounds or facilities of any school or within one thousand feet (1,000')

> of the real property that comprises a public or private elementary school, middle school or secondary school shall be punished one (1) classification higher than is provided in § 39-17-417(b)-(I) for such violation.

Tenn. Code Ann. § 39-17-432(b) (1997).

The state presented proof that the defendant sold two baggies of a white powder, represented to be cocaine, for $110. The white powder was tested by the TBI. Ms. White testified that a preliminary test confirmed that each baggy contained a substance from the family of drugs of which cocaine is a member. She then prepared a sample of the drug for further testing by combining a small amount from each bag, a procedure which has been previously approved of by this court. See State v. Holbrooks, 983 S.W.2d 697, 702 (Tenn. Crim. App. 1998) (holding that the evidence was sufficient to establish that all fifty-one rocks contained cocaine where the forensic chemist testified that she performed chemical analysis of eight of the fifty-one rocks of cocaine that had been purchased from the defendant); see also State v. Leon Goins, No. W1999-00157-CCA-R3-CD (Tenn. Crim. App., at Jackson, May 2, 2000) ("tests on discrete units or samples of alleged controlled substances are generally a basis for an expert witness's conclusions regarding the total weight of that sample"); State v. Copeland, 677 S.W.2d 471, 474 (Tenn. Crim. App. 1984) (holding that forensic testing which established that 39 of 2900 quaalude tablets contained a controlled substance was sufficient to establish that all of the tablets contained a controlled substance). The second test established that the white powder contained cocaine. While the state was unable to prove the actual percentage of cocaine contained within the substance, this court has previously held that "a substance containing cocaine" would include the weight of any "cutting agent or medium along with the weight of the scheduled substance." State v. Alcorn, 741 S.W.2d 135, 138 (Tenn. Crim. App. 1987). The jury accredited the testimony of the state's witnesses, as was its prerogative, and was authorized to make reasonable inferences from the proof presented. See Copeland, 677 S.W.2d at 474 (holding that the accuracy of forensic testing is a jury question). That the defendant represented the baggies contained cocaine, that the TBI chemist had confirmed each baggy contained a cocaine family member substance, and that a combined sample from each baggy was positive for cocaine are persuasive circumstances of the guilt of the defendant. In our view, the evidence was sufficient to support the conviction.

**II**

The defendant also argues that the twenty-year sentence is excessive. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden

is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). If the trial court's findings of fact are adequately supported by the record, this court may not modify the sentence even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991).

In calculating the sentence for a Class A felony conviction, the presumptive sentence is the midpoint within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement factors but no mitigating factors, the trial court shall set the sentence at or above the midpoint. Tenn. Code Ann. § 40-35-210(d). If there are mitigating factors but no enhancement factors, the trial court shall set the sentence at or below the midpoint. Id. A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

In arriving at the defendant's sentence, the midpoint within the range, the trial court found that there were "no mitigating or enhancing factors of any substantial weight." The trial court determined that while the defendant's youth and lack of a serious criminal record would provide some mitigation, any weight given to those factors was negated by the fact that the defendant had initially failed to appear for his scheduled trial.

The defendant asserts that the trial court should have assigned more weight to his youth and lack of criminal record, which included only three convictions for driving on a suspended license. In addition, he contends that the trial court should have considered in mitigation his turbulent childhood, steady work history, and the relatively small amount of drugs involved.

At the sentencing hearing, it was established that the twenty-one-year-old defendant had been reared by his grandparents and by his father. His father had abused drugs and had served time in prison. The defendant, who had been steadily employed as a cook at a number of restaurants since dropping out of high school in the tenth grade, claimed that he sold illegal drugs to help support his father, who had been disabled in a car accident. The defendant explained that he chose to sell drugs across the street from the elementary school in order to avoid the dangers of "turf wars" that occurred in other neighborhoods. He insisted that he had neither harmed the children nor sold them drugs.

The range for a Class A felony is between 15 and 25 years. See Tenn. Code Ann. § 40-35-112(1). The defendant's youth qualifies as a mitigating factor. So does his lack of a significant prior

criminal history, although it is apparent that the defendant had engaged in the sale of illegal drugs for some period of time. His failure to appear can be classified as criminal behavior. See Tenn. Code Ann. § 40-35-114(1) (1997). Because the trial court was required by law to begin at the midpoint in the range and because there was a factual basis for determining that the potential enhancement factors offset the potential mitigating factors, the twenty-year sentence cannot be classified as excessive.

Accordingly, the judgment of the trial court is affirmed.

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GARY R. WADE, PRESIDING JUDGE